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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

HOWARD LAWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S MOTION TO STRIKE

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INDEX

CASES

	Page
Grant v. *United States*, 227 U. S. 74	13
Norris v. *Alabama*, 294 U. S. 587	6
Pollard v. *United States*, 352 U. S. 354	6
Soriano v. *United States*, 352 U. S. 270	6
United States v. *White*, 322 U. S. 694	12
Wheeler v. *United States*, 226 U. S. 478	13

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At every stage of this proceeding, petitioner has charged Government counsel with misconduct. We believe that his latest charge, contained in his motion to strike filed October 2, 1957, is as "utterly unwarranted" (R. 2972) as those so characterized by the Court of Appeals.

I

The material in the Government's brief which petitioner asks be stricken relates to the single issue of the use at the trial of Exhibits 61A and 61B. This issue was first raised by petitioner in the Court of Appeals.*

* Petitioner has at no time filed a motion in the district court for a new trial on this ground.

where he contended, as he does here, that the use of these exhibits violated his privilege against self-incrimination. The Court of Appeals found that petitioner had examined the items at the trial and had decided to make no objection. (R. 2971.) In his brief on the merits in this Court, petitioner renews the argument and supports it on the basis of statements of fact many of which have no basis at all in the record and are merely founded on petitioner's naked assertions. Some of these assertions, we believe, are not only incorrect but imply serious misconduct on the part of the Government before the Court of Appeals.

We were faced with the choice of insisting that petitioner confine himself to the record or answer matters he raised outside the record by facts de hors the record. Under these circumstances the Government thought it fair and proper to refer to facts outside the record where petitioner stated them incorrectly and where the true facts, known to petitioner, seemed beyond dispute. This also seemed the better course because of the implications of misconduct. We have tried to give the court the whole story upon which to base its judgment. If there is a *bona fide* dispute as to the facts outside the record to which we referred, the Court should not, of course, rely upon them in reaching a decision.

The Government's brief fully disclosed the points at which reference was made to facts outside the record and, we thought, adequately explained why this was done. We respectfully refer the Court to the brief, page 28, footnote 11, and pages 39–41. At the

risk of further diverting the Court's attention from the merits of the case, we here explain at greater length the circumstances which caused the Government, in answering petitioner's charge, both to make a statement as to facts not of record and to indicate the basis on which that statement was made. We review petitioner's conduct in this proceeding and his assertions outside the record for that reason.

In this case, petitioner, convicted of a criminal offense, failed to assert at the trial level the constitutional privilege which he now claims. As a consequence, he failed to get into the record a number of facts upon which the establishment of his claim would depend. He then attempted in the Court of Appeals, and in this Court, to supplement the record by his own assertions entirely outside the record. That petitioner's case is based on facts outside the record is apparent from his brief. As pointed out in our brief, pages 40–41, his position with respect to the use of Exhibits 61A and 61B rests on a long list of factual assertions, some of which are incorrect and many of which are not based on matters of record. For example:

1. Petitioner asserts that the pink date stamp on the back of Exhibits 61A and 61B was not seen by defense counsel at the trial. (Br. 16.) The record certainly does not establish this fact.

2. Petitioner's brief asserts, "This pink stamp did not appear on exhibits legally obtained by the Government." (Br. 17.) This assertion is wholly outside the record and, we believe, incorrect. We understand that a number of documents produced be-

fore the grand jury by government witnesses were reproduced on days when the grand jury was sitting.

3. During oral argument in the Court of Appeals, petitioner held up an original check and check-stub, which has now been forwarded to this Court (see printed copies facing R. 2998 and facing R. 3000). Petitioner asserts that these are the documents which he produced before the 1952 grand jury. We believe this to be the case, but it is not a fact of record.

4. The foundation of petitioner's case is that the check dated November 7, 1945, which he produced before the grand jury in 1952 (R. 2798), is the original of the document of which Exhibit 61A is a copy, and that the stub there referred to (R. 2798) is the document of which Exhibit 61B is a copy. Although we accept this as true, and a jury might be warranted in reaching the same conclusion, it is not established by the record.

5. Petitioner asserts that it is "incontrovertible" that Exhibits 61A and 61B were "papers obtained in violation of the privilege against self-incrimination". (Br. 18.) A factual premise of this statement is that the papers were personal papers of petitioner Lawn as to which he could have asserted a Fifth Amendment privilege. The record provides no support for such a proposition. As stated in our brief (p. 45) (see also *infra*, p. 11), we believe the record amply demonstrates that the documents were in fact business records as to which petitioner had no privilege. A second factual premise of petitioner's assertion is that petitioner Lawn had not waived whatever privilege he might have had with respect to these documents prior

to the time they were obtained. This extra-record assertion we felt constrained to deny and to explain the basis for doing so.

6. Petitioner states that it is "incontrovertible" that the papers were "ordered by two District Judges to be returned to Lawn, and it is incontrovertible that the prosecutor did not comply with the Judges' orders." (Br. 18.) These statements are unsupported by the record. In fact, the record shows that the return orders applied only to originals, not copies. (See Gov. Br. pp. 45–47, and record citations there given.) And petitioner himself states that the "originals" were "returned to petitioner." (Br. 13.)

7. In seeking to establish actual prejudice by the Government's use of one photostatic copy of the check and check-stub, rather than another, petitioner made a series of assertions as to which there is not the slightest basis in the record. In the Court of Appeals, Government counsel had stated that other copies of the check and stub were in its possession months before the 1952 grand jury proceeding and could have been easily substituted at trial if objection had been made to the copies offered. (R. 2971). Petitioner responded by making extensive assertions in his brief in this Court as to extra-record facts.[1]

[1] *E. g.*:

"There were no other copies of Exhibits 61A B in this prosecutor's possession before the 1952 proceedings or at the time of the trial. The prosecutor did not obtain the so-called 'untainted' copies until January, 1956, or nearly a year after the trial and just before the argument of the appeal below. After being advised that petitioner's appellate counsel had detected the use of unconstitutional evidence, the prosecutor then

These, in effect, charged Government counsel with deliberately deceiving the Court of Appeals and suggested, at least, that the facts were contrary to what the Government had said.

Against this background the Government considered it proper to present to the Court [2] the grounds for the factual conclusion that petitioner had waived any privilege with respect to the check and stub by provid-

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set about for the first time to seek out and secure the copies referred to as 'untainted' by the Court below. Seemingly these 1956 copies were obtained from a New Jersey Grand Jury's custody without petitioner's knowledge or consent (R. 2977-9)." (Br. 19.)

"The naked facts are that the prosecutor used Exhibits 61A–B on the trial and these were the only copies in his possession or that he had ever seen up to and at that time." (Br. 19.)

"The reference to other copies in the Government's possession is to a copy of the questioned papers which were in the possession of a Grand Jury in New Jersey. The prosecutor in this case did not have in his own possession in New York any copies of the papers other than the tainted copies. However, in January 1956 during the pendency of the appeal herein the New York prosecutor sent to New Jersey and obtained a photostat from the files of the New Jersey Grand Jury of Exhibits 61A–B (R. 2979)." (Br. 24.)

[2] The Court may, in its discretion and where circumstances so warrant, consider matters outside the record. See, *e. g.*, *Norris* v. *Alabama*, 294 U. S. 587, 593 fn. 1. At least twice in the last Term, the Government, during argument, was asked to supply material dealing with the particular case and outside the record. (*Soriano* v. *United States*, 352 U. S. 270 (the administrative file on the claim there involved); *Pollard* v. *United States*, 352 U. S. 354 (the transcript of what took place in the courtroom between the first colloquy with the defendant and the subsequent, invalid sentencing.) Where the documents are undisputed or in the nature of official records, the exercise of this discretion may be particularly justified.

ing the Government with a copy in May 1952. In so doing, consideration was given to the following:

1. The circumstances of the May 1952 hearing (stenographic transcript, formal advisement of constitutional rights, under oath, counsel present, numerous witnesses, signed receipt, etc.) were such that it was assumed petitioner would not dispute the basic facts.

2. The matter could not have been introduced at the trial, because petitioner had not raised the question.

3. In the Court of Appeals the Government made an "offer of proof" that it had acquired copies prior to the 1952 grand jury proceeding.

4. Petitioner in his brief stated as facts outside the record that the Government did not have available any other copies which could have been used at the trial. (Br. 19, 24, 26)

5. Petitioner's allegations, in effect, charged the Government with deliberately deceiving the Court of Appeals as to the facts.

6. It appeared that petitioner was asserting before this Court a violation of a constitutional privilege which petitioner had previously waived. (We do not mean, thereby, to cast a reflection on petitioner's present counsel, who has stated under oath that at the time of filing his brief in this Court he "never previously had been apprised of the meeting of May 12, 1952 or of the 'transcript' now presented". Motion to Strike, 7–8.)

7. We considered the transcript as establishing a formal waiver of privilege which should be treated by

an appellate court, if that is where the privilege is first asserted, as here, in the same way that it considers matters relating to mootness, abatement, and other such issues first raised after the case is on appeal.

8. As petitioner recognizes, the Government's brief fully disclosed the nature of the material to which it referred and the basis for the factual statements. The brief also explained why the material was being referred to. (Gov. Br. 39–41.)

9. The alternatives of letting petitioner's unsupported assertions stand, moving to strike them, or making a bare, undocumented, denial seemed less desirable than fully disclosing the factual basis for our position.

II

We agree with the position, implicit in petitioner's motion to strike, that the Court should not, in reaching a decision, rely on any fact outside the record as to which there is a *bona fide* dispute. But it is not clear to us that petitioner challenges the basic facts to which our brief referred, namely, that some two months prior to the 1952 grand jury proceeding petitioner, formally advised of his constitutional rights, discussed under oath and delivered to the Government at an administrative proceeding, not before a grand jury, photostatic copies of the check and stub of which Exhibits 61A and 61B are also photostatic copies. The suggestion of petitioner's counsel that the transcript of

the hearing may not be accurate (Motion to Strike, 7), and his statement that "There are many issues of fact * * *" (Motion to Strike, 6) do not seem directed at the facts which we assumed, and still believe, are beyond dispute. Should petitioner's counsel, after discussing the matter with petitioner, indicate to the Court that in good faith he disputes the truth of the essential facts referred to in the portions of the Government's brief which he asks be stricken, the Government would not oppose the striking of these matters. We believe, however, that a formal "striking" is not necessary and that the Court may simply reach its decision without relying on any facts outside the record (including those asserted by petitioner) as to which there appears to be a *bona fide* dispute. This would avoid the problem of considering which portions of petitioner's brief should be struck on the same ground.

But if all extra-record matters are to be struck* and the Court wishes to decide the issue solely on the record, we believe it must affirm the decision below since petitioner failed to put in the trial record the objections and alleged facts on which he now rests.

Petitioner suggests two legal grounds why copies of the check and stub obtained in May 1952 might not

*If the Court should so conclude, we respectfully request that this response be treated as a cross-motion to strike from petitioner's brief references to matters outside the record. See *supra*, pp. 3-6.

have been admissible at the trial if he had objected to the copies that were offered. (Motion to Strike, 6) The first is that the secrecy of a grand jury proceeding attaches to documents delivered to a United States Attorney under the circumstances indicated by the transcript. The second is, in effect, that Judge Goddard's dismissal of the 1952 indictments makes it *res judicata* that each document presented to that grand jury was privileged as to each of the defendants there involved. We believe that neither argument has any merit. We discuss the second in our brief, pages 43–45. That the Court may have to consider these legal issues not passed upon by the district court is one consequence of petitioner's not having raised the issue of privilege at the trial; it would not seem a proper ground for ignoring facts, if they are undisputed.

We believe action by the Court on petitioner's motion to strike should be held in abeyance pending argument of the case next week. The extent to which the facts involved are undisputed may be clarified by the oral argument. Should the Court, after argument, be satisfied that certain facts are undisputed it could then, in its discretion, and we believe properly, take those facts into account. To the extent that the Court should find there exists a *bona fide* dispute as to any of the facts not disclosed by the record, the Court should not, we agree, rely on such facts in reaching a decision. As stated in our brief, "It is our view that the record, by itself, adequately demonstrates that there has been no violation of petitioner's

constitutional rights and no prejudice." (Br. 41.)[3]

There should be no necessity for a remand.[4]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROGER FISHER,
Assistant to the Solicitor General.

OCTOBER 1957.

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[3] In his motion to strike petitioner asked that the Government be directed to file a corrected brief omitting any reference to matters not of record. (Motion to Strike, 2.) In view of our suggestion that consideration of the motion to strike be postponed, and for convenience of counsel and the Court, we outline briefly in an Appendix, *infra*, pp. 11–13, grounds, based wholly on the record, which we believe dispose of the contentions made by petitioner in Point I of his brief, pp. 22–34.

[4] Should the Court disagree with the Government and believe that the decision of the Court of Appeals cannot be sustained on the ground on which it relied or on the other grounds suggested, any remand should not be for a new trial but to the district court to enable petitioner to file a motion for new trial and to have a hearing on that motion at which time petitioner could seek to establish his privilege with respect to the check and stub, the non-availability of other copies, no prior waiver, etc.

APPENDIX

Outline of Grounds, Wholly Within the Record, Which Dispose of Petitioner's Contentions With Respect to Exhibits 61A and 61B

(See footnote 3, *supra*, p. 10)

1. *The record shows that the check and stub were business records as to which petitioner could assert no privilege against self-incrimination*

As stated in our brief (page 45), the record shows that the cancelled check and corresponding stub were business records of the Tavern Fruit Juice Company, an unincorporated enterprise. Petitioner so acknowledged when he produced them before the 1952 grand jury in response to the subpoena for books and records of the various companies. (R. 2785, 2787, 2798.) Petitioner himself revealed that the papers were not from his personal files but that he had acquired them, at his own request, about ten weeks before from Giglio, one of the partners. (R. 2803.)

On these undisputed facts drawn from the record, we believe the law is clear. An individual cannot assert his personal privilege against self-incrimination with respect to the business records of a corporation or an unincorporated association. *United States* v. *White*, 322 U. S. 694. There is no issue as to the circumstances in which partnership records might be the personal papers of one of the partners, since Lawn was not a partner of the Tavern Fruit Juice Company but rather an employee. (R. 1023.) And the character of the documents was not altered by the

fact that petitioner later acquired custody. *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478.

2. *Petitioner's counsel waived any objection to these very exhibits at the time they were offered in evidence.*

The items to which petitioner now objects were examined by his experienced trial counsel who interposed "No objection." (R. 1022.) The fact that the date on which the particular photostatic copy was made appeared on the back of the document in no way concealed from counsel what the exhibit was. (Gov. Br. 48–49.) This was the ground relied on by the Court of Appeals. (R. 2971.)

Even if one assumes that petitioner's counsel thought that it was a different copy of the check which was being offered, having waived any objection to one copy petitioner cannot assert a privilege as to copies no more incriminating than the one as to which privilege was waived.

3. *The failure to file the memorandum requested by the district court suggesting the trial evidence that might have been based on evidence before the 1952 grand jury was an independent waiver of any objection which reasonable compliance with the trial court's request would have produced.*

Although not argued as a separate ground as to this issue in our brief, we believe that petitioner's failure to submit the memorandum repeatedly requested by the trial court (R. 1957–1958; 1962–1963, 2076; Gov. Br. No. 10, pp. 31–32) constitutes an independent waiver of any objection to Exhibits 61A and 61B. Petitioner produced only four items before the 1952 grand jury (R. 2798); of two of these Ex-

hibits 61A and 61B are copies. Petitioner was asked by the trial judge to examine the record to see if any of the exhibits introduced in evidence at the trial could have come from any of the items produced before the 1952 grand jury. Any compliance with the judge's request would have revealed to petitioner what he now claims he discovered for the first time on appeal. Whatever the date on the back of the photostat, compliance with the court's request would have caused petitioner to suggest that perhaps a photostatic copy of a check might have come from the check which he produced before the 1952 grand jury. Having waived the right to file the memorandum, petitioner also waived the objections which that memorandum would have raised.

4. *No harm or prejudice.*

Petitioner's claim, in essence, is that it was a denial of due process to use one particular photostatic copy of a check rather than the photostatic copy which his counsel thought was being introduced at the trial. There was no possible harm or unfairness to petitioner, one copy of the check was no more incriminating or damaging than another.